United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To be argued by
ALLEN GREEN

74-1195

United States Court of Appeals

FOR THE SECOND CIRCUIT

DELTA DATA SYSTEMS CORPORATION,
Appellee,

—against—

GRAPHIC SCANNING CORP.,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

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INDEX

AUTHORITIES CITED

Cases:

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Preliminary Statement

Graphic Scanning Corp. ("Graphic") appeals from a judgment, entered on December 6, 1973, in favor of Delta Data Systems Corporation ("Delta") in the sum of $34,275.81, with interest of $2,332.59, plus costs, in the United States District Court for the Southern District of New York after a three day trial (December 3-5, 1973) before Hon. Milton Pollack, District Judge, and a jury. On December 12, 1973, costs were taxed in the amount of $1,833.05. The appeal is also from an order of the District Court (Pollack, J.) made and entered on November 20, 1973, refusing to allow Graphic to introduce evidence in support of its counterclaim at the trial pursuant to Rule 37, Fed. R. Civ. Proc., and ordering Graphic to proceed to trial on December 3, 1973, without completing discovery proceedings, and from an order of the District Court (Pollack, J.)

made and entered on November 29, 1973 denying Graphic's motion to vacate the order of November 20, 1973, adjourn the trial and permit Graphic to complete discovery.

The summons and complaint, No. 73 Civ. 1110 MP, filed on March 14, 1973, contains two counts. The first count is for goods sold and delivered, leaving a balance of $34,-275.81, and the second is for an account stated in that amount.

The answer denied the essential allegations of the complaint and interposed an affirmative defense and counterclaim for damages caused by breach of warranties in the sale of the computer equipment sold by Delta to Graphic.

On October 24, 1973, the District Court ordered the case set for trial on December 3, 1973, although Graphic had virtually no discovery while Delta had been permitted extensive discovery. Further, without prior notice to Graphic, and after requested information had been supplied by Graphic in discovery proceedings, the Court refused to permit Graphic to introduce evidence in support of its counterclaim and refused to allow it to conduct discovery.

The jury found for Delta in the sum of $34,275.81 on December 5, 1973.

Questions Presented

1. Did the District Court violate Rule 37, Fed. R. Civ. Proc., by refusing to permit Graphic to introduce evidence in support of its counterclaim and in imposing said sanction without Graphic's having received prior notice and after Graphic had supplied the discovery requested of it?

2. If the provisions of Rule 37 were adhered to, did the District Court nevertheless abuse its discretion by imposing the aforesaid sanction?

3. Did the imposition of the aforesaid sanction deprive Graphic of property without due process of law in violation of the Fifth Amendment?

4. Does the lack of any specific findings to support the aforesaid sanction warrant reversal of the judgment?

5. Did Delta waive any right to seek the aforesaid sanction by accepting alternative discovery dates?

6. Did the District Court violate Rule 26, Fed. R. Civ. Proc., and abuse its discretion, by forbidding Graphic to take discovery while permitting extensive use of discovery to Delta?

The Facts

A. *The Summons and Complaint*

The summons and complaint were filed on March 14, 1973. The complaint (reprinted in the Appendix) consists of two counts; the first, for goods sold and delivered, contains only two paragraphs, one stating jurisdictional allegations and the other alleging only that Delta sold to Graphic certain goods at an agreed price and reasonable value of $35,198.81, of which $923 was paid, leaving a balance of $34,275.81. The second count alleges only that Graphic owes Delta $34,275.81, according to the account stated as annexed to the complaint; the annexed invoice consists of invoice numbers, dates and monetary amounts.

B. *Answer and Counterclaim*

On April 19, 1973, Graphic answered, denying the essential allegations of the complaint. Graphic interposed an affirmative defense and counterclaim (reprinted in the Appendix) alleging that Graphic, which is engaged primarily in providing specialized data and information processing and delivery services to fulfill particular industry needs, commenced negotiations in October, 1971 with Delta relating to a prospective offer to design, manufacture, install and service for Graphic a data communications system to be used by Graphic for the specified purpose of providing specialized communications services to the trucking industry.

The services included the high speed processing of applications for state trucking permits relating to overweight or overdimension trucks that must be sanctioned for travel over specific highways, and also providing for the transfer of money to truck drivers located at specified truck stops around the country. The equipment which comprised the proposed system was to include cathode ray tube display devices, line printers, high speed code conversion devices, communication interfaces, and high speed tape cassettes. The system was to be installed in Graphic's central computer facility located in New York City and at the offices of various trucking companies which would be Graphic's customers and at state permit agencies.

Delta's offer to design, manufacture, install and service the system was made after numerous discussions between the parties in which Graphic fully described the system and the immediate sales campaign it would embark upon to seek out new customers for the service, if it could be assured that such a system could be fully operational

within a specified time period. Upon Delta's express representations that the system would accomplish all of Graphic's needs, and that Delta could deliver and install a working system within the period Graphic required, Graphic ordered the system on March 27, 1972 and specified that delivery would be required within 30 days.

Thereafter, Graphic embarked upon an extensive sales campaign to solicit prospective customers. However, subsequent to March 27, 1972, Delta advised Graphic that it was encountering various problems relating to the design and manufacture of the circuit boards and other components of the system. After several unsuccessful attempts to install a working system, Delta installed the system which it purported to be operable on or about June 6, 1972. The system did not operate from the first day it was installed, and, although Delta made some attempts to repair the system, these were unsuccessful and the system never operated as Delta represented it would. Graphic was never able to utilize the system effectively to service its customers in the trucking industry.

The counterclaim thus alleges breach of the warranties of merchantability and fitness for a particular purpose as described in the Uniform Commercial Code, and also alleges breach of contract by Delta in failing to make timely delivery and installation of the system and failing to provide an operating and usable system.

Graphic's damages are stated in the counterclaim, as follows:

(i) injury to its reputation and loss of customers in the amount of $180,000, as it planned to have its trucking network operating no later than May 1, 1972, it had made

representations to various trucking industry customers of such facts, and had lost more than 50 customers due to its failure to be able to perform;

(ii) loss of profits during the 40 day period of late delivery in the amount of $40,000;

(iii) Graphic had paid Delta $25,000 on account prior to the time when it became apparent that the system was not operable;

(iv) Graphic purchased peripheral equipment at a cost of $20,000, to be used in connection with the system, which has no use to Graphic; and

(v) Graphic incurred various other expenses in the amount of $10,000 because of late delivery and the failure of the system to operate properly.

In its reply filed on May 23, 1973, Delta denied the essential allegations of the counterclaim.

C. *Discovery*

On or about May 15, 1973, Delta served a request for production of documents (reprinted in the Appendix) pursuant to Rule 34, Fed. R. Civ. Proc. Contrary to Rule 34, however, the return date for inspection was only days later, on May 18, 1973. The request, comprising some three pages, related to seven distinct categories of documents, including correspondence between the parties and their attorneys and writings between Graphic and its trucking industry customers; an all-inclusive category specified all other documents either relevant or reasonably calculated to lead to discovery of evidence.

On or about May 18, 1973, Graphic served a request for production of documents (reprinted in the Appendix) pursuant to Rule 34. This request sought documents regarding the design, installation and maintenance of the system. It was at this point that in the interest of orderly proceedings, counsel for the parties agreed that Graphic would withhold its discovery proceedings until Delta had completed its discovery (see paragraph 2 of affidavit of Barry Wolkowitz, sworn to November 21, 1973, in support of motion to vacate Rule 37 sanction).

With regard to Delta's request for production of documents, Graphic complied to the best of its ability. However, Graphic moved from New York City to New Jersey in the period from April to October, 1973, and many documents were searched for as the records became available. It was not until November, 1973, one month after the move had been completed, that Graphic was able to certify that all the documents had been provided (see affidavit of B. Wolkowitz, *supra*).

On or about September 6, 1973, Delta served a request for discovery and inspection pursuant to Rule 34 by which it sought to inspect, photograph, examine and test not only the data communications equipment mentioned in the counterclaim but also the data processing and other equipment presently used by Graphic for the purposes of providing specialized communications services to the trucking industry. Again, the notice provided for by Rule 34 was not adhered to by Delta, as the inspection date set in the request was September 18, 1974. Because of Graphic's response that the proposed inspection would cause it undue expense, disrupt its business and breach the confidentiality of the system, Delta moved on September 24, 1973, by mo-

tion returnable October 5, 1973, for an order requiring such inspection. In his affidavit in support of the motion, Delta's counsel claimed that the inspection and test of the equipment was necessary "in order to properly prepare for trial and to defend against defendant's claim of breach of warranty. . . ." Continuing, he said: "If plaintiff is not permitted to examine and make tests of this equipment, it would be compelled to go to trial in ignorance of the nature of the alleged defects in the aforesaid equipment, if any, and would therefore be unable to effectively defend against defendant's counterclaim." On October 24, 1973, the District Court disposed of the motion first by setting the case down for trial on December 3, 1973, with proposed agreed and disputed findings to be filed by November 26, 1973, and granted the motion to inspect with certain restrictions to preserve confidentiality.

In the meantime, Delta began to conduct depositions. It took the deposition of Graphic by Barry Yampol, president, on August 28, 1973 from 10:30 A.M. to 3 P.M.; the transcript of this session consists of some 137 pages. Mr. Yampol's deposition was further held on November 19, 1973 from 1:30 P.M. to 3:05 P.M., comprising 59 additional pages. On August 28, 1973, Delta also took the deposition of Thomas J. Wynne, then a vice president of a division of Graphic, beginning at 3:20 P.M., with the transcript of that deposition comprising some 50 pages. Mr. Wynne's deposition was further conducted on November 14, 1973, and was adjourned by Delta's counsel to December 5, 1973 in Philadelphia, Pennsylvania. Delta took the deposition, comprising some 109 pages, of Graphic by Glenn Mattson, its treasurer, on November 13, 1973, from 11:20 A.M. to 7 P.M. Delta also took the deposition, comprising some 55

pages, of Edward Fenning, an employee of Graphic, on November 20, 1973, at 4:30 P.M.

In addition to depositions, documents and inspection, Delta was also proceeding with other avenues of discovery. Thus, on or about September 5, 1973, it served interrogatories, 34 in number, comprising some seven pages (reprinted in the Appendix). The interrogatories were answered on or about November 9, 1973. Interrogatories 1-9 relate to that portion of the counterclaim dealing with Graphic's loss of customers in the trucking industry. In answer thereto, Graphic stated that its claim for damages as a result of loss of customers would require not only extensive time and money but would also bring its customers into this litigation and that it was therefore withdrawing its claim for damages for these items. Similarly, interrogatories 15-22 relate to the sales and contracts lost which form the basis of Graphic's claim of loss of profits during the 40 day delay in delivery. In answer thereto, Graphic answered in the same manner as with interrogatories 1-9. Thus, by stipulation dated November 16, 1973, and so ordered by the District Court on November 19, 1973, Graphic withdrew most of two specific paragraphs (18 and 19) of its counterclaim for damages for loss of customers and loss of profits, and Delta agreed to withdraw interrogatories 1-7 and 15-22. Interrogatories 8 and 9 were answered on or about November 28, 1973. Interrogatory 8 asked for the names and addresses of every Graphic customer in the trucking industry to whom Graphic provided specialized communications services prior to September 1, 1972 and interrogatory 9 asked for the names of the persons who have personal knowledge of the facts listed in answer to interrogatories 1-8.

D. *November, 1973: Discovery Disputes*

On November 7, 1973, a conference was held with Judge Pollack on Delta's request for inspection (see affidavit of B. Wolkowitz, *supra*). At that conference, it was determined that further depositions of Graphic would be taken, and November 14 was set as the date. On November 13, Graphic's treasurer, Glenn Mattson, was examined for an entire day, from 11 A.M. to 7 P.M.; its president was originally to have been examined that day but Delta desired to examine the treasurer, who, accordingly, was produced. On November 14, 1973, the deposition of a former Graphic employee, Thomas Wynne, was continued and that deposition was adjourned by Delta's counsel to December 5, 1973 in Philadelphia, Pennsylvania.

On November 13 or 14, 1973, counsel for the parties agreed that the deposition of Graphic's president, Barry Yampol, would be continued on or about the week of November 19. However, at a conference with Judge Pollack, it was directed that Mr. Yampol's deposition was to be taken on the afternoon of November 19; in fact, it was taken and completed that day.

On November 14, 1973, Graphic's counsel had consented to the completion of Graphic's deposition on November 20, 1973, so long as the depositions of Delta could be completed prior to trial. However, the next date Delta's counsel could schedule the depositions was December 3 because of his trip to Florida. On November 19 the District Court informed counsel that the December 3 trial date was firm, and that therefore the agreement of November 14 between counsel to take the deposition of Delta's personnel was void. On that day Graphic served a notice to take Delta's

deposition by four of its employees, beginning November 23 and ending November 27, and it also served a further request for production of documents (the first request having been served in May). Counsel for Graphic requested a conference for November 20 to compel Delta to provide discovery.

Instead of ordering discovery of Delta, the District Court, on November 20, 1973, held that Graphic was not entitled to take the depositions of Delta, and in addition, it "refused" Graphic's counterclaim and held that Graphic would be denied the opportunity to introduce any of the designated matters in the counterclaim at the trial. At the November 20 conference, Delta's counsel made an oral application, without prior notice to Graphic's counsel, to strike the answer and counterclaim for alleged defaults in discovery. A partial transcript of this conference is reprinted in the Appendix. The allegations made orally therein by Delta's counsel and the answers given thereto at that time by Graphic's counsel are as follows:

(a) The principal "default" cited by Delta's counsel was that a Graphic employee, Edward Fenning, its operations manager, did not appear for a deposition on the morning of November 20 as ordered by the Court. Delta's counsel claimed he was informed on November 19 that Graphic did not wish to produce Mr. Fenning and that on November 20, Graphic's counsel said that Mr. Fenning could not be found.

Graphic's counsel stated to the Court that the deposition of Fenning was agreed to by letter of November 14 between counsel but it was subject to the deposition of Delta taking place in the week of December 3 on the premise that the trial date could be adjourned. When it became appar-

ent that the trial date could not be adjourned, on November 19, 1973, Graphic's counsel tried to arrange a disclosure schedule for Delta; but when the latter's counsel refused to return the telephone call of Graphic's counsel, the latter requested a conference before the Court. Graphic's counsel acknowledged that on the morning of November 20, the Court had ordered Mr. Fenning to appear for deposition at 2 P.M., but that Mr. Fenning was not at work or at home in the morning. Mr. Fenning came to work at 2:30 that afternoon, when Graphic's counsel was called at the Courthouse and told that Mr. Fenning was available. Delta's counsel was requested to adjourn the deposition for one hour but refused. When the District Court was informed that Mr. Fenning could be available within one hour, Judge Pollack said "Get him here," and the deposition proceeded that afternoon.

At the conference of November 20, Delta's counsel then claimed that the Fenning episode was the culmination of a series of alleged defaults:

(b) It was claimed that on November 6, 1973 the District Court ordered the deposition of Graphic by its president, Barry Yampol, to take place on November 13, 1973. On November 12, Delta's counsel claimed that Graphic's counsel told him that it was not convenient for Mr. Yampol to appear that day, and Mr. Yampol did not appear on November 13. A conference was held with Judge Pollack, who ordered Mr. Yampol to appear on November 19, and in fact Mr. Yampol did appear on that day and was deposed. Graphic's counsel explained that the alleged default of Mr. Yampol on November 14 was not willful but was due to a breakdown in communications between his office and Mr. Yampol, and that the alleged default was thus

not that of Graphic. It was also noted that Mr. Yampol's deposition originally took place on August 28 and was not rescheduled until November and that the Court had ordered the deposition of Graphic by its treasurer, Glenn Mattson, and its former employee, Thomas Wynne, to be taken on November 13 and 14, and those depositions were taken on those dates.

(c) Delta's counsel claimed that, with regard to its interrogatories, Judge Pollack had ordered on November 6 that they be answered no later than November 10. He claimed that those interrogatories were not answered by noon on November 10 and that interrogatories 1-7 and 15-22 were not answered at all. He acknowledged that Graphic was withdrawing certain portions of the counterclaim and said that when he came before the Court on November 19, he was offered a written stipulation dated November 16 to withdraw those portions of the counterclaim, and it was so ordered by the Court. However, he claimed that interrogatories 8 and 9 had still not been answered.

Graphic's counsel stated that Graphic did serve its answers to interrogatories timely, but that interrogatories 8 and 9 were not answered because it was thought that counsel for Delta was withdrawing his demands for those interrogatories when he was informed that Graphic was withdrawing its claim for the subject thereof. In any event, the answer to interrogatory no. 9 had been supplied to Delta's counsel, who acknowledged that Mr. Fenning might be examined that afternoon at his deposition on interrogatories 8 and 9.

(d) Delta's counsel complained that he had "quite a problem" inspecting Graphic's equipment. He referred to a purported Court order of November 6 specifying where

the inspection was to take place. Apparently, some of the equipment was not in Graphic's premises in New Jersey, but was in Graphic's other premises at 11 Broadway, New York, New York, to which Delta's representatives proceeded from New Jersey. However, Graphic's counsel stated to the Court that that was the first time it had been claimed that Delta had not had a complete inspection of the equipment.

(e) Delta's counsel alleged that by purported order of November 6 all documentary production was to be completed on November 10, and that although he did get "a lot of documents" some time after November 10, there were still some documents outstanding with regard to delivery of replacement equipment from Hazeltine to Graphic.* Graphic's counsel stated that all documents in Graphic's possession had been produced.

Delta's counsel alleged that the conduct of Graphic interfered with his discovery and prevented its completion; he said that "it is a total violation" of the discovery rules and requested an order dismissing the counterclaim and entering judgment on the complaint. In response, Graphic's counsel stated that there had been a complete breakdown in communications between counsel for the parties and cited a letter of May, 1973 written by Delta's counsel and providing for the deposition of Delta to take place on May 31, 1973—a deposition which was never taken.

The Court, without making specific findings, ruled as follows:

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* As revealed in the answers to interrogatories, the design and purchase of a replacement system for the Delta equipment constitutes a substantial part of Graphic's damages.

"Mr. Fenning is to be produced and examined here, this afternoon, within the hour. The defendant's counterclaim will be refused at the trial, and the defendant will be denied the opportunity to introduce any of the designated matters in that counterclaim, namely, the damage to its reputation, the cost of purchasing other equipment to be used in conjunction with the plaintiff's equipment and the amount expended for a new system, as elements of counterclaim against the plaintiff at the trial.

The Court is satisfied that the defaults recited by the attorney for the plaintiff have occurred and that they are factually and legally inexcusable and have required the assistance of the Court in order to partially correct those defaults. The Court will withhold any further sanctions in respect of those defaults for the time being and until after Mr. Fenning has been examined, at which time the Court will consider whether or not the disobedience of the defendant warrants the striking out of the alleged defenses and the entry of a judgment by default in favor of the plaintiff."

In conclusion, the Court stated:

"Now you have an official record, which will be certified up to the Court of Appeals for any purpose that may be appropriate in this case. This is an official court reporter."

In November, 1973, after the aforesaid ruling, Graphic moved to vacate the sanction, adjourn the trial and permit it to complete discovery of Delta. The Court denied this motion on November 29, 1973. The motion noted the extensive discovery conducted by Delta, but that Graphic, contrary to stipulation between counsel, had had virtually no discovery. Graphic stated that it would be seriously prejudiced without permitting the jury to hear depositions

on its case and without permitting the jury to consider the counterclaim at the same time. In opposition to the motion, Delta reiterated its contentions at the November 20 conference and stated that it was not afforded adequate notice of the motion—although it was Delta that made the oral motion, without any prior notice to Graphic, which resulted in the ruling of November 20, 1973.

Finally, on or about December 1, 1973, counsel for Delta served an amended complaint, in which it was alleged that the goods sold were of the value of $59,626.81, of which $25,351 had been paid, leaving a balance of $34,275.81.

E. *The Trial*

During the trial, Graphic found itself prejudiced by the sanction with respect to the counterclaim and the lack of discovery of Delta.

For example, Graphic wanted to show certain equipment was returned to Delta. Delta's controller, George W. Kaelin, revealed that certain records which would assist in establishing Graphic's claim were at Delta's offices in Pennsylvania (57).* Delta's counsel objected to sending copies thereof that afternoon by a special copying device. Mr. Kaelin stated that he did not have available information showing whether certain items were returned to Delta, but that such information was in Pennsylvania (77).

Delta's president, Barry Borden, had no direct information on how often service representatives were sent to Graphic (133-134). When he was asked about the re-

* References bearing numbers only are to the stenographer's minutes of the trial.

ports of specific service representatives, Mr. Borden did not even know whether Delta had such records, or, if so, where they would be (134). The lack of such service reports further hampered Graphic's counsel in his questioning of Francis McEntee, Delta's director of manufacturing (168). Some service reports were handed over in a folder to Graphic's counsel, but not until his examination of Mr. McEntee (172). When Mr. McEntee was asked whether Delta had records to show when an agreement with the service organization was in effect, he responded: "Yes, I am sure back at the plant we do" (179). The prejudice to Graphic resulting from its lack of discovery was made all the more apparent in the following examination of Mr. McEntee (373):

> "Q. Isn't it a fact that the service records for these terminals is far less than the service required on the new terminals? A. I don't know, sir. I don't have any records.
>
> Q. Do you have records of this? A. I don't here. I don't have any records here.
>
> Q. You do have records as to how many service calls were made for the— A. I don't know whether the new service manager kept records. I have been out of service for a while. They have gone through three managers there.
>
> Q. You don't know whether the records are available? A. No."

The Court instructed the jury a deposition may be considered part of the evidence (428). However, it was only Delta which read from depositions (379, 380, 384) (of Messrs. Wynne, Mattson, and Yampol), since Graphic had not been permitted to take depositions. Delta's counsel argued to the jury that Mr. McEntee's testimony had not been impeached (422).

The lack of a counterclaim at the trial was also prejudicial to Graphic. In summation, Delta's counsel argued at the outset (408):

"Please remember that we, Delta Data, brought this case in this court to have you, the jury, decide that Graphic Scanning owed Delta Data the sum of $34,272.81 with interest from November 1st, 1972. That's what this case is all about." Delta's counsel repeated this argument in the conclusion of his summation, arguing that "this is a simple case" and "If there is anything more to this case it escapes me, ladies and gentlemen of the jury. It escapes me" (423-423a).

The District Court, in its charge to the jury, instructed (442):

> "The only verdict for money damages that can be awarded in this case is in favor of the plaintiff. If your verdict is for defendant, it may not award any damages to the defendant since there are no counterclaims of the defendant for you to decide in this case."

During the trial, Delta's counsel had even mentioned the existence of a counterclaim in front of the jury (282).

POINT I

The District Court violated Rule 37, Fed. R. Civ. Proc., by refusing to allow Graphic to introduce any evidence supporting its counterclaim.

Rule 37, Fed. R. Civ. Proc., governs sanctions for failure to make discovery. Rule 37(a) allows a party, "upon reasonable notice," to apply for an order compelling discovery. If, *inter alia,* a party fails to answer an interrogatory or fails to respond to a request for inspection, the discovering party may move for an order compelling discovery. Rule 37(a)(2). According to Rule 37(b), if a party then fails to obey an order providing for discovery, the Court may impose certain sanctions, including an order refusing to allow the disobedient party to support the designated claim or prohibiting him from introducing designated matters into evidence. Finally, according to Rule 37(d), if a party "fails to appear" before the officer who is to take his deposition, "after being served with a proper notice," or to serve answers or objections to interrogatories, or to serve a written response to a request for inspection, the Court may impose, *inter alia,* the aforesaid sanction.

> "Except to the extent that Rule 37(d) is applicable, therefore, failure to disclose . . . cannot be punished by imposition of sanctions under Rule 37(b) until the Court has ordered compliance after motion and notice as provided in Rule 37(a) or an order has been made in conjunction with a proceeding for a protective order under Rule 26(c) or a proceeding under Rule 37(d)." 4A Moore's *Federal Practice* ¶37.03 [2.-1] at 37-50.

In the instant case, no formal motion was made by Delta for an order compelling discovery. Indeed, the record shows

no such order prior to November 20, 1973, when the sanction was imposed (except for the order allowing inspection). However, if the informal oral applications before Judge Pollack can be considered such motions, certainly there was no notice, reasonable or not, to Graphic, of the motion made on November 20, 1973. Further, it was Graphic which had requested that meeting in order to compel discovery of Delta. Thus, the sanction could not lawfully have been applied pursuant to Rule 37(a) and (b).

There can be no excuse for Delta's lack of compliance with the Federal Rules of Civil Procedure. "An application to the court for an order shall be by motion which . . . shall be made in writing. . . ." Rule 7(b)(1), Fed. R. Civ. Proc. The motion generally must be served not later than five days before the return date. Rule 6(d), Fed. R. Civ. Proc., S.D.N.Y. Calendar Rule 8(A). The order itself must also be in writing, and the notation in the docket sheet constitutes its entry. Rules 77, 79, Fed. R. Civ. Proc.; S.D.N.Y. General Rule 11. In view of its own non-compliance with the Rules, it does not behoove Delta to request sanctions against Graphic for alleged violations of the same Rules. The lack of written motions and orders speaks for itself (see Point IV, *infra*).

Nor can the sanction be justified by Rule 37(d). There was neither a failure to serve answers to interrogatories, nor to appear for a deposition after being served with proper notice, nor to serve a written response to a request for inspection (see pages 8-14, *supra*).

All interrogatories were timely answered, although two interrogatories relating to that portion of the counterclaim which was voluntarily withdrawn had not been answered because it was thought that the information was no longer desired; when Delta still insisted on the answers, they

were supplied. The request for inspection was ruled upon in writing, and was complied with; no contrary finding appears in the record. Nor is there any failure to appear for a deposition; Graphic's President was deposed twice, its treasurer was deposed, its operations manager was deposed, and a former employee was deposed twice; that there might have been difficulties in scheduling exact dates of these depositions, particularly because one deposition was conditioned upon Graphic's being able to take the deposition of Delta, is certainly no ground for a sanction, particularly when at the time the Court imposed the sanction of November 20, all depositions of Graphic had been completed except for that of its operations manager, which was ordered that very morning and completed that very afternoon. Nor is there any indication in the record that Delta served Graphic with any notice, proper or not, to take the deposition of Graphic on so many occasions by so many employees. For all we know, one or more of the depositions may have been taken of persons in their individual capacity, and, in such event, sanctions cannot be imposed on the corporation for the failure of its officers to appear. *El Salto, S.A.* v. *PSG Co.,* 444 F.2d 477 (9th Cir. 1971), *cert. den.* 404 U.S. 940 (1971).

The sanction imposed with respect to the counterclaim caused severe prejudice to Graphic at the trial. Essentially, this case concerns equipment sold to Graphic by Delta, which equipment did not and does not operate. Because of the absence of the counterclaim, the jury was erroneously led to believe that this was a "simple" case (423). To prejudice matters even further, the existence of a counterclaim was mentioned by Delta's counsel in front of the jury (282). In summation, Delta's counsel argued

that the subject of the case was what Graphic owed to Delta (408), and that it was his client which brought "this case in this court, to have you, the jury, decide that Graphic Scanning owed Delta Data the sum of $34,272.81, with interest from November 1, 1972. That's what this case is all about." In fact, in its charge to the jury, the District Court made specific reference to the lack of counterclaims for the jury to decide and to the fact that the only verdict for money damages that could be awarded is in favor of Delta (442).

Appellant acknowledges that the District Court judges have a wide discretion in the area relating to discovery. However, as Judge Waterman has said, "the Rules do prescribe the limits of their discretion, and it is within those limits that appellate courts have indicated the district judges must operate." (Waterman, Sterry R., "An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance With Pretrial Orders," 29 F.R.D. 420, 421.) See also, *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958); *Sibbach* v. *Wilson & Co.,* 312 U.S. 1 (1951). Thus, this Court's first concern is to find out "whether the record shows that the district judge has followed the provisions of the Rules."

To summarize: with regard to Rule 37(b), there is no order prior to November 20, 1973 (with the exception of the inspection order of October 24, 1973), pursuant to Rule 37(a) providing for discovery. With regard to Rule 37(d), there is no question that answers to interrogatories were served timely; the fact that Delta was not satisfied with answers to two of the thirty-four interrogatories does not warrant the sanction imposed, since Delta could have secured a specific order for a proper answer and time to

comply therewith; it has been held that Rule 37(d) "does not apply for anything less than a serious or total failure to respond to interrogatories." *Halverson* v. *Campbell Soup Company,* 374 F.2d 810 (7th Cir. 1967). Further, with regard to Rule 37(d), all depositions of Graphic were in fact conducted and completed by November 20, and there can thus be no violation by Graphic, particularly when there was no proper notice served for the depositions as the Rule requires. The sanction in this case appears to be nothing less than an *ex post facto* penalty imposed to punish alleged general misbehavior instead of to secure discovery. 4A Moore's *Federal Practice* ¶37.03 [2.-2] at 37-56; *Dorsey* v. *Academy Moving and Storage, Inc.,* 423 F.2d 858 (5th Cir. 1970).

In *Independent Productions Corp.* v. *Loew's Inc.,* 283 F.2d 730 (2d Cir. 1960), this Court held that when Rule 37 provides for specific sanctions in the event a party refuses to answer oral questions propounded to him at his deposition, those specific sanctions had to be utilized, and a resort to other sanctions by the district judge based upon his inherent powers was error. As Judge Waterman noted, the proposition that where the Rules set forth his powers a district judge must confine himself to the powers so granted him is best exemplified by *Sibbach* v. *Wilson & Co., supra.* The United States Supreme Court there reversed a contempt conviction because of a failure to submit to a physical examination, the Court holding that Rule 37 (b)(2)(iv) expressly provides that the contempt sanction is not available for that type of non-cooperation. The reversal was ordered by the Supreme Court despite the fact the claim of error was not made on appeal to the Court of Appeals because it was "plain error of . . . a fundamental nature. . . ."

POINT II

If Rule 37 was adhered to, the District Court nonetheless abused its discretion by refusing to permit Graphic to introduce evidence in support of its counterclaim.

If it be held that the District Court did follow Rule 37, this Court, while reluctant to overturn a lower Court's decision after trial, will step in to correct manifest injustice. 29 F.R.D. at 423. The test to be applied is whether the record reveals that the district judge abused his discretion or whether the action taken was improvident and affected the substantial rights of the parties.

Assuming that the District Court meant to refuse any evidence as to the counterclaim and not to dismiss it, we are still faced under the circumstances with a drastic sanction similar to those of dismissal and judgment by default. "The withdrawal from defendant of the right to introduce any evidence in his own behalf bearing upon the issues of fact in the case seems drastic." *Matheny* v. *Porter,* 158 F.2d 478 (10th Cir. 1940). This is the type of sanction where appellate judges would be "remiss in their duties if they only chose to rubber stamp such orders of lower courts." 29 F.R.D. at 424. Continuing, Judge Waterman said:

> "To be sure, these drastic sanctions are indeed provided for by the Rules, but I am certain that the draftsmen did not propose that they should be used liberally in order to eliminate the actual trial of cases."

He suggests that appellate judges believe that a district judge should approach with hesitation the use by him of

dismissal sanctions and that where an alternative, less drastic sanction, would be just as effective, it should be utilized. 29 F.R.D. at 425.

An example of a less drastic sanction can be found in *Austin Theatre* v. *Warner Bros. Pictures,* 22 F.R.D. 302 (S.D.N.Y. 1958), where failure to answer interrogatories two and one-half years after they were served resulted in a stay of further proceedings on the part of the plaintiff until answers were furnished and also to the imposition of costs, with the court stating that it was reluctant to penalize a party by dismissal where the cause may have been the neglect of the attorney to comply with an order of the Court.

In *Kearns* v. *Seven-Up Company,* 30 F.R.D. 333 (E.D. Pa. 1962), interrogatories served in August 1960 were answered in February 1962. However, the Court ruled that Rule 37, by its terms, does not impose sanctions for *"delay"* in answering interrogatories (emphasis in original).

Only last year, in *Vac-Air, Inc.* v. *John Mohr & Sons, Inc.,* 471 F.2d 231 (7th Cir. 1973), the sanction of default was vacated on appeal as too harsh for failure to answer interrogatories where the answers were ultimately submitted one month after they were due. The Court held "the extreme sanction of default or dismissal must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited, and that where an alternative, less drastic, sanction would be just as effective it should be utilized." It was found that judicial discretion should have indicated other less extreme initial steps to accomplish the results in compliance with the order to answer interrogatories.

In *Robison* v. *Transamerica Insurance Co.*, 368 F.2d 37 (10th Cir. 1966), the Court of Appeals reversed an order dismissing the action without prejudice for failure to answer interrogatories. The language of the Court is quite pertinent:

> "Rule 37 is the means by which the courts enforce compliance with the discovery scheme in the Rules. It affords a broad choice of remedies and penalties for failure to comply. . . . The administration of the rules lies necessarily within the province of the trial court with power to fashion such orders as may be deemed proper to vouchsafe full discovery for the just, speedy and inexpensive determination of the lawsuit . . . But, the sanctions provided in the rule are not absolute; they are couched in terms of 'may', not 'shall'; they contemplate the exercise of judicial discretion which is, of course, always subject to review for abuse . . . .
>
> "The plaintiff was derelict, but he was contrite. The trial court was obviously impatient, perhaps even injudicious. After all, the purpose of the discovery rules is to produce evidence for the speedy determination of the trial. *The office of 37(d) is to secure compliance with the discovery rules, not to punish erring parties.* We think the spirit and purpose of the rule would have been best served and the expense of this appeal avoided if appellant had been allowed to answer instanter, as apparently he was prepared to do" (emphasis added).

In *Campbell* v. *Johnson,* 101 F. Supp. 705 (S.D.N.Y. 1951), an order had been made granting defendant discovery and inspection of certain books and records. Defendant moved for an order that plaintiff be precluded at trial from offering proof as to a certain defense, alleging failure of plaintiff to comply fully with the order of discovery. Judge Ryan held that an order of preclusion would

be justified only in "the exceptional case" and that "there must be proof of gross indifference to the rights of the adverse party, of deliberate callousness or intended negligence which occasions the inability to comply," elements which "we do not find . . . here."

In *Syracuse Broadcasting Corporation* v. *Newhouse,* 271 F.2d 910 (2d Cir. 1959), this Court also dealt with an order of preclusion. In modifying the preclusion order this Court noted:

> "At the same time, however, it must be remembered that a preclusion order is a drastic remedy . . . and while the district court clearly has the power to issue such an order . . . that power should be exercised only to the extent necessary to achieve the desired purpose —that is, an entirely just disposition of the case in a speedy and efficient manner. Of course, in view of its knowledge of the facts, discretion must be accorded the district court in its resolution of these administrative problems. This of necessity must be so, but when we are convinced that the court below has exceeded a proper discretion in that the order imposed was too strict or was unnecessary under the circumstances, we would be remiss in our duties if we did not set that order aside."

In *Independent Productions Corp.* v. *Loew's Incorporated, supra,* this Court again reversed a dismissal of a complaint on the ground that corporations failed to appear at their pretrial examination. Noting that the remedy was so drastic that it should only be applied "in extreme circumstances," this Court quoted Chief Judge Clark in *Gill* v. *Stolow,* 240 F.2d 669 (2d Cir. 1957), as follows:

> "In final analysis, a Court has the responsibility to do justice between man and man and general principles

> cannot justify denial of a party's fair day in court except upon a serious showing of willful default."

In *Meeker* v. *Rizley,* 324 F.2d 269 (10th Cir. 1963), plaintiff's failure to appear at a hearing on pretrial matters was held not to constitute grounds for dismissal. The action had been pending less than four months prior to the date set for the conference, and the Court found that the "law favors the disposition of litigation on its merits." In *Gill* v. *Stolow, supra,* this Court set aside a default judgment based on a defendant's failure to be present for the taking of his deposition in New York. Such defendant subsequently appeared in New York and substantiated a claim that ill health had prevented him from previously appearing. This Court said:

> "Reluctant as we are to interfere, we feel that this is an occasion where, viewed with the hindsight afforded us by a study of the entire record, the penalty assessed is too drastic and the case must be returned to accord defendants a trial of the seriously contested issues of fact involved." Accord, *Linnear* v. *White,* 442 F.2d 864 (7th Cir. 1970).

This Court further noted that the default could not be properly characterized as willful since the record did show ill health and a real attempt to comply with the Court's order thereafter. In language well applicable to the instant case, this Court said:

> "This is yet more true in the light of the excessive tolerance of delay so customary in American courts . . . Considering the summer vacation and the Court's calendar, it is doubtful that any real delay in the trial would have ensued from a decision to take his testimony—certainly not one of years, which we now envisage as the result of our necessary reversal. This is a case which in view

> of the sharp charges and countercharges of fraud, peculiarly requires the final settlement of a trial; and we conclude that we must order it. We do not think our action should be an occasion for further delay, and therefore require Harry to be available for his deposition, if the district court shall so require, within a month of the issuance of our mandate. Further we think the case should go promptly to trial thereafter and that the supersedeas bond in the sum of $30,865 which defendants have posted should stand to respond to whatever final decision may be rendered."

Since a supersedeas bond in excess of $40,000 has been obtained in this case, appellant suggests to the Court that, upon a reversal of the judgment herein, it, too, is willing to proceed with dispatch.

POINT III

The District Court's sanction with respect to the counterclaim deprived Graphic of property without due process of law, contrary to the Fifth Amendment.

As has been revealed, the "refusal" of the counterclaim was not in accord with Rule 37, and further, constituted an abuse of the District Court's powers. However, even more basically, such a drastic sanction as the preclusion order herein deprived Graphic of the opportunity for a hearing on the merits of its counterclaim and thus deprived it of property without due process of law in violation of the Fifth Amendment. As the United States Supreme Court said in *Societe Internationale* v. *Rogers*, *supra*:

> "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth

Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey* v. *Elliott*, 167 U.S. 409, and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations."

As the United States Supreme Court further said in *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966):

"The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice."

POINT IV

The judgment below should be reversed because of the lack of findings by the District Court.

The record with regard to discovery reveals, besides the sanction herein, an order denying Graphic's motion for discovery of Delta. Otherwise, the record contains only contrary allegations by counsel as to what occurred in informal conferences with the Court on various questions regarding discovery.

With regard to the preclusion order of November 20, 1973, the record shows the opposing contentions of counsel and the ruling of the District Court (see pp. 11-15, *supra*); however, such ruling contains no findings, and thus it is impossible for this Court to know the basis of the District Court's ruling.

In *Von Der Heydt* v. *Rogers,* 251 F.2d 17 (D.C. Cir. 1958), the case had been dismissed for failure to produce documents; but the Court of Appeals remanded because it was unable to afford an adequate appellate review without specific findings relating to the several issues of the case in order that it may know the basis of the District Court's decision. As Judge Waterman noted, this decision was reached despite the fact that the record of over 1,500 pages contained a great deal of evidence relating to the documents. 29 F.R.D. at 424. In his concurring opinion, Judge Burger stated:

> "While the District Court characterized its order as containing 'findings,' the recitals are conclusory in nature and, as all of us agree, those recitals do not give us an adequate basis for appellate review of the specific

> issues we are compelled to treat; viz., (a) materiality of the information sought; (b) possession, custody or control of the information in appellant; and (c) refusal of appellant to obey an order made under Rule 34. In other words we need to know what basic facts the District Court finds as showing each of these elements, together with the conclusions of law which follow in consequence of the application of the pertinent rules, before we can determine whether the evidence warrants a dismissal."

In last year's decision by the United States Court of Appeals for the Seventh Circuit in *Vac-Air, Inc.* v. *John Mohr & Sons, inc., supra,* the Court noted that the district court docket sheet showed no relevant order having been entered and thus "we cannot assess the nature of that default, if there was one."

POINT V

Delta waived any right it may have had to seek an order of preclusion with regard to the counterclaim.

On November 20, 1973, when Delta made its oral application to the Court for sanctions, Delta had already received the overwhelming amount of its discovery. It had inspected equipment in New Jersey once and in New York twice, it had received many documents, it had deposed Graphic's president twice, its treasurer once and a former employee twice, and agreed to examine its operations manager that afternoon. When particular dates for depositions were unsatisfactory, the record shows that Delta finally did accept other dates (see p. 10, *supra*). By doing so, it waived its right to ask for sanctions.

In *Hinson* v. *Michigan Mutual Liability Company,* 275 F.2d 537 (5th Cir. 1960), the District Court had ordered the plaintiff to appear for physical examination at a particular place and time on a particular day. The plaintiff failed to appear, but the defendant, by undertaking to arrange other appointments for plaintiff to be examined, was held to have waived any right it might have had to seek the penalty of dismissal against the plaintiff. The failure of plaintiff to appear on the new dates was held not to be a refusal to obey the order of the Court which specified another time. A failure, if excusable, did not constitute a refusal to comply with an order, and an excuse, though tardily tendered, was held entitled to the Court's consideration.

POINT VI

The District Court violated Rule 26, Fed. R. Civ. Proc., and further abused its discretion by forbidding discovery by Graphic and allowing discovery only by Delta.

This case went to trial some eight months (which include the summer vacation period) after service of the summons and complaint in March, 1973. Issue was joined on May 23, 1973, with the service of Delta's reply. In May, 1973, the parties exchanged requests to produce pursuant to Rule 34. It was at that point that counsel for the parties agreed that, in the interests of order, the discovery by Graphic would not proceed until after Delta had finished its discovery (see p. 7, *supra*).

Accordingly, Delta went ahead and obtained four depositions, inspection of equipment, document discovery and answers to many pages of interrogatories. The only discovery obtained by Graphic was that, virtually on the eve of trial, it received certain documents from Delta in answer to Graphic's request made in May. Graphic never had a chance to examine Delta as to the documents it received or to depose Delta with regard to the counterclaim of breach of warranties of highly sophisticated electronic equipment and technology; nor was Graphic in a position to impeach any of Delta's witnesses. To prejudice Graphic even further, the Court and counsel for Delta emphasized that there was no counterclaim for the jury to decide.

The importance of discovery is evident in this case where the complaint contains only bare, conclusory allegations and where the counterclaim relates to defects in computer

equipment. Delta's attorney stated that discovery (*i.e.*, inspection) was necessary for him to prepare for trial and to defend against the counterclaim. Does not the same reasoning apply equally to discovery by Graphic? Delta's stated ignorance at the trial as to its own records demonstrates the prejudice to Graphic: can it be denied that Graphic might have discovered material facts if these records, located in Pennsylvania, had been made available to it in the course of a deposition of Delta? The relevant consideration is that the denial of discovery might have been responsible for the failure of a party to prove its case. *Williams* v. *Continental Oil Co.*, 215 F.2d 4 (10th Cir. 1954), *cert. den.* 348 U.S. 928 (1955).

While a court generally has power over its own calendar, the Federal Rules of Civil Procedure must take precedence. Rule 29 of the Federal Rules of Civil Procedure and S.D.N.Y. Civil Rule 4 permit, and even encourage, agreements between counsel as to the order of discovery. In this case, Delta had finished its discovery within eight months from service of the summons, and if Graphic had been permitted to obtain full discovery, the case surely would have come to trial in less than a year—certainly not an unreasonable time span. Yet, with full knowledge that discovery was far from complete, and on a completely unrelated motion for an order to inspect equipment, the District Court on October 24, 1973 set the case down for trial on December 3, 1973. Graphic's protest that it had no discovery not only went unheeded by the District Court but on November 20, 1973 the District Court specifically forbade any discovery by Graphic.

Rule 26(a) of the Federal Rules of Civil Procedure confers upon a party the right to discovery by all of the

listed devices. This right is not restricted to particular types of actions. 4 Moore's *Federal Practice* ¶26.51 at 26-101.

In *Roebling* v. *Anderson,* 257 F.2d 615 (D.C. Cir. 1958), the Court of Appeals ordered a new trial where the District Court, after plaintiff-appellant presented her evidence, had entered a judgment for defendant. Appellant had been hampered in her presentation by the refusal of the lower court to order pre-trial discovery. The Court of Appeals deemed such refusal to be error and ordered that discovery be permitted prior to the new trial. The Court stated that appellate courts will interfere with the trial court's disposition of matters of discovery when the ruling is improvident and affects the substantial rights of the parties. In noting that a denial of discovery would unduly prejudice plaintiff's preparation, the Court referred to the general guides laid down by the United States Supreme Court in *Hickman* v. *Taylor,* 329 U.S. 495 (1947):

> "'[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.'"

The same liberal philosophy with respect to allowing discovery was stated in *Morgan Smith Automotive Products, Inc.* v. *General Motors Corp.,* 54 F.R.D. 19 (E.D. Pa. 1971), as follows:

> "In arriving at our determination, we are restrained to temper our judgment by the limitations that have been imposed upon us by the spirit of discovery rules and the decisions relating thereto which have acknowledged that in civil cases, utmost liberality, in respect to allowing discovery, should prevail in favor of each party as against the other."

In *Frasier* v. *Twentieth Century-Fox Film Corporation,* 22 F.R.D. 194 (D. Neb. 1958), the Court held that although the case was more than five years old and the Court was not persuaded that depositions could not have been taken earlier, it would not deny the right to take them simply because of the age of the case. As long as the witnesses knew facts which were material or which would lead to discovery of material facts, their interrogation was held proper, and the Court refused to impute any improper motives to counsel.

In *Williams* v. *Continental Oil Co., supra,* the Court of Appeals reversed the decision of the District Court not to allow a certain survey to be made. A directed verdict for defendant was reversed because "without the making of such a survey, plaintiffs can never secure an adjudication of the critical issue in the case, based upon a foundation which is certain and sure."

Appellant herein was even willing, under the greatest of pressure and in the most hurried circumstances, to take the deposition of Delta from November 23-27, 1973. However, the District Court refused to allow such discovery. As long as the trial would not have been delayed, it is beyond comprehension why such discovery was forbidden to Graphic. *Havell* v. *Time, Inc.,* 1 F.R.D. 439 (S.D.

N.Y. 1940). The District Court thus erred in the following particulars:

(i) It arbitrarily set a trial date when the parties were still engaged in discovery and when the case was only seven months old;

(ii) It refused an adjournment of the trial date to allow Graphic to conduct its discovery;

(iii) It refused to allow Graphic to conduct discovery from November 23 to November 27, 1973, when it abruptly cut off discovery as of November 20, 1973; and

(iv) By its ruling it allowed full discovery to Delta but none to Graphic, thus resulting in a situation where Delta knew its own and Graphic's case thoroughly but where Graphic was without many facts to support its affirmative defense and counterclaim dealing with complicated computer equipment and technology. As a result, Delta's counsel could tell the jury that the testimony of an important Delta witness had not been impeached (422). That Graphic is being held responsible for the payment of $1,372.95 as costs incidental to the taking of its own depositions by Delta only highlights the prejudice to it.

Thus, as Judge Waterman so aptly stated, despite the necessity of judge-controlled calendars, the appellate courts will not permit the district courts arbitrary action in the grant of dismissals. 29 F.R.D. at 425. As Judge Waterman concluded:

> "In summary, then, appellate courts, happily or unhappily, have the obligation to scrutinize the exercise of discretion by the district courts, and to confine that exercise to reasonable limits—limits, that is, that the *appellate* courts consider reasonable! In that scrutiny

> appellate courts will be influenced in their review of district court discretion by the source of the power the court relied upon and the severity of the sanctions it imposed. In fairness to the litigants, where, either by the Federal Rules or by Local Rules, a specific rule is set forth, a court's strict compliance with that specific rule is required. Where no specific rule exists the appellate courts will not hamstring district judges by denying them adequate power to deal with any situation not specifically provided for. In the final analysis we of the appellate courts should only insist that the 'punishment fit the crime'" (emphasis in original).

Obviously, the punishment did not fit the "crime," but also there was no "crime" to which punishment could be attached.

CONCLUSION

For the aforesaid reasons, the judgment below should be reversed and the case remanded for a new trial on the complaint and counterclaim, and appellant should be afforded an adequate opportunity to begin and complete its discovery in accordance with the Federal Rules of Civil Procedure.

Respectfully submitted,

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Service of ~~three~~ TWO (2) copies of the within BRIEF is admitted this 8th day of APRIL 1974

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